Testimony of Congressman Doug Ose
Transportation and Infrastructure
Water Resources & Environment Subcommittee Hearing
"Inconsistent Regulation of Wetlands and Other Waters"
March 30, 2004

It has been more than three years since the January 2001 Supreme Court decision revoking the Army Corps of Engineers' so-called Migratory Bird "Rule.[1]" This landmark wetlands decision, *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001), commonly known as SWANCC, held that the Corps exceeded its authority when it used the existence of migratory birds as a basis for asserting Federal jurisdiction over waters of the United States under Section 404 of the Clean Water Act (CWA).

Since the Supreme Court's decision, the 38 Corps district offices have filled the vacuum left by the Supreme Court's decision with widely varying interpretations of what is considered a "water of the United States" and, therefore, subject to Federal jurisdiction. While it is appropriate for Federal agencies to consider site-specific conditions when implementing regulations, Federal agencies should not apply Federal statutes and regulations on an ad hoc basis. For three years, the CWA Section 404 permitting system has been chaotic and, to my chagrin, the Administration has decided not to ameliorate this regulatory uncertainty.

As a former owner of several small businesses and now a Member of Congress, I find the Corps' ad hoc jurisdictional decisions to be unfair and unacceptable public policy. As a result, I have been deeply involved in this issue for three years and have taken steps to bring this problem to the public's and the Administration's attention.

In January 2001, ten days after the SWANCC decision, the Corps and the Environmental Protection Agency (EPA) issued a joint memorandum to their regional offices instructing district staff not to assert jurisdiction over waters and wetlands solely on the basis of use by migratory birds (Attachment A). In light of the Supreme Court's questioning of the constitutionality of jurisdiction over isolated, intrastate and non-navigable waters, Federal district staff were also instructed to consult agency legal counsel. This swiftly-issued memorandum did little to clarify Federal jurisdiction.

In May 2001, the Corps issued a subsequent memorandum prohibiting districts from developing local practices for asserting jurisdiction and from using any practices not in effect before the SWANCC decision (Attachment B). The Corps stated that the purpose of the prohibition on new practices was to minimize any inconsistencies among the districts.

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[1] The so-called Migratory Bird "Rule" is, in fact, not a codified rule promulgated under the Administrative Procedure Act. Instead, it is merely language that was included in the noncodified preamble to a 1986 Corps regulation entitled "Final Rule for Regulatory Programs of the Corps of Engineers" (51 FR 41206). This so-called "Rule" stated that, "waters of the United States" could include waters "which are or would be used as habitat by birds protected by Migratory Bird Treaties" (51 FR 41217).

Notwithstanding this memorandum's intent, regulatory uncertainties are common throughout the Corps district offices.

By the Fall of 2002, more than a year and a half had passed since the SWANCC decision, yet, EPA and the Corps had neither issued clarifying guidance nor initiated a rulemaking. In response to this inaction, in September 2002, the House Government Reform Subcommittee on Energy Policy, Natural Resources and Regulatory Affairs, which I chair, held a hearing entitled "Agency Implementation of the SWANCC Decision." Hearing witnesses testified that, regardless of their interpretation of SWANCC, both Federal agencies and the regulated community would greatly benefit from additional nonregulatory guidance and/or a codified rule clarifying when Federal jurisdiction applies. I would like to submit a copy of the full hearing print for your hearing record.

Robert Fabricant, former General Counsel for EPA, testified that EPA recognized, "that field staff and the public could benefit from additional guidance on how to apply the legal principles in individual cases" (p. 18). Thomas Sansonetti, then Assistant Attorney General for Environment and Natural Resources at the Department of Justice, admitted that, "[i]t is not so much the standard, it is the application of those standards to a set of facts that really provides the problem" (p. 36). Mr. Sansonetti further confirmed that Federal jurisdiction varies from case to case and that a person would have difficulty finding certainty in the existing regulations.

I concluded from the Subcommittee's hearing that, prior to the SWANCC decision, the Corps used the so-called Migratory Bird "Rule" as a basis for jurisdiction whenever possible rather than answer the harder questions of "neighboring," "isolated," and other terms defined in the Corps's codified rule entitled Definition of Waters of the United States (33 CFR § 328.3). However, once the so-called Migratory Bird "Rule" was invalidated, the Corps found itself in the same position as the regulated community, i.e., without a clear set of criteria or standards for applying Section 404 of the CWA and its implementing regulations.

Another consequence of the regulatory uncertainty is the Corps' permit applications backlog. According to the Office of Management and Budget's Fiscal Year 2005 Budget Program Assessment Rating Tool (PART), permit processing times continue to increase. In 2001, the Corps had a 120 day processing completion rate of 61 percent. This statistic fell to 56 percent in 2003. Clearly, the backlog caused by the SWANCC decision is negatively impacting the Corps' performance.

In January 2003, EPA and the Corps finally published an Advanced Notice of Proposed Rulemaking (ANPRM) in the Federal Register (68 FR 1991, Attachment C). The ANPRM stated that, "the goal of the agencies is to develop proposed regulations that will further the public interest by clarifying what waters are subject to the CWA jurisdiction and affording full protection to these waters through an appropriate focus of Federal and State resources consistent with the CWA." The ANPRM did not put forth any specific regulatory scheme; rather, it solicited comments "on issues related to the jurisdictional status of isolated waters under the CWA which the public wishes to call to our attention." The ANPRM includes

an Appendix with a joint EPA and Corps issued guidance document superceding the January and May 2001 guidance. It does not clarify the key issues.

In February 2003, I asked the General Accounting Office (GAO) to conduct a study "into what criteria district and regional offices use in making these jurisdictional determinations and to what extent these criteria vary from region to region." During the summer of 2003, I personally met with Army policy officials and they promised that a rulemaking was forthcoming. Despite promises from the Administration, in December 2003, the Administration reneged on its promise to provide certainty to States and the regulated community.

Shortly after the Administration's decision, in February 2004, GAO submitted its study to me.[2] GAO's conclusions confirm the chaos that the regulated community is experiencing and essentially reiterate witness testimony from the Subcommittee's September 19, 2002 hearing. GAO's report states that, "Corps districts differ in how they interpret and apply the Federal regulations when determining what wetland and other waters fall within the jurisdiction of the Federal government. Districts apply different approaches to identify wetlands that are adjacent to other waters of the United States" (p. 3).

For example, GAO reports that, "[p]rior to the 2001 SWANCC decision, the Corps generally did not have to be concerned with such factors of adjacency, tributaries, and other aspects of connection with an interstate or navigable water body, of the wetland or water body qualified as jurisdictional water on the basis of its use by migratory birds" (p. 9). Dominick Izzo, Deputy Assistant Secretary for Civil Works for the Army, testified in my Subcommittee's September 2002 hearing that, prior to SWANCC, the "migratory bird rule provided an umbrella over all the other jurisdictional issues" (p. 37).

The GAO report provides examples of how factors that determine jurisdiction are interpreted and weighed differently in Corps district offices across the nation. For example, in the Galveston district office, staff uses the 100-year floodplain to determine whether a wetland is adjacent to waters of the United States. In contrast, the Jacksonville and Philadelphia district offices use the 100-year floodplain as one of many factors considered when making jurisdictional determinations. Chicago and Rock Island, however, do not consider 100-year floodplain at all (pp. 17-18).

According to GAO, the treatment of "man-made conveyances are the most difficult and complex jurisdictional issue faced by the Corps" (p. 22). District offices have varying practices to test whether a man-made conveyance provides a wetland sufficient connection to a water of the United States to impose Federal jurisdiction (pp. 22-26). For example, GAO reported that three district offices would find a wetland jurisdictional if water flowed in a man-made surface conveyance between the wetland and the water of the United States. Other districts reported that a "ditch would also need to have an ordinary high watermark or a display of wetland characteristics in order to establish jurisdictional status for a

[2] GAO initially informed me that it would issue its report on January 12, 2004. On January 2, 2004, GAO asked to extend the deadline to February 27, 2004 to include recent events, such as the Administration's decision not to pursue a rulemaking, in its report.

wetland." Still other districts require the presence of water at least once a year and that the water flow from the wetland though the ditch and into a water of the United States. Yet, if the flow of water was reversed, that is from the water of the United States to the wetland, the Corps would not find jurisdiction. Finally, another district states that a "ditch would establish a tributary connection for a wetland only if the ditch was a modification of or replacement for a natural stream" (pp. 22-23). Clearly, citizens across the country are not subjected to the same interpretations for determining jurisdiction. Attachment D includes my summary chart compiled from data in GAO's report. In addition, I would like to submit a copy of the full GAO report for your hearing record.

The inconsistency in criteria is not merely between Corps districts, it is also within a single office. I have heard from numerous private citizens who have sought Section 404 permits within the same district office. In each case, the Corps asserted jurisdiction using different criteria. For example, in my own district, there is no specific number of feet that certain isolated body of water must be to another water to be "adjacent" or "neighboring" and, therefore, jurisdictional. In some cases it can be 20 feet. In other cases, there is no specific distance; yet, the Corps asserts jurisdiction.

EPA and the Corps have acknowledged the inconsistent application of the CWA's implementing regulations. GAO's report confirms it. Mr. Fabricant testified at the Subcommittee's September 2002 hearing that, as a result of the confusion, "our [EPA] efforts have also focused on determining where rulemaking might be advisable" (p. 18). Despite the developing case law, Mr. Fabricant further testified that, "the Army Corps and EPA retain authority to move forward with guidance or rulemaking before those court cases are decided. We are not in a holding pattern waiting for those cases to be decided" (p. 32). Mr. Fabricant also testified that there is no definition of the words "contiguous," "bordering," or "neighboring" in law or regulation. He then concluded "[t]hat sort of begs the question whether this might be an appropriate area to consider for additional rulemaking" (p. 47).

Mr. Izzo also admitted that there is no national consistency in how the regulations and statute are applied. While expressing sympathy for the dilemma that inconsistency places on citizens, he affirmed that there is no single standard nation-wide for defining "adjacency" or "isolated waters." He then stated that the standard would be subject to a new rulemaking (p. 53).

More than three years since the SWANCC decision, there is still no national policy regulating when a citizen can or cannot discharge into "waters of the United States" because no one knows what the term "waters of the United States" really means. This absence of definition cannot be a license for Federal staff to make it up. The consequence is that citizens in one part of the country are regulated by one set of rules and citizens in another part of the country are regulated by another set of rules.

Today, I call upon the Administration to resolve this problem once and for all by requiring both EPA and the Corps to require that all district offices consistently interpret the law. This does not mean that the Corps should not take into consideration local environmental

conditions and other site-specific considerations. All I ask for is that jurisdictional interpretations be standardized so that those who are affected by this law know what the law actually requires. Fairness dictates nothing less to our citizenry.

Attachments